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No. 03-1550

Supreme Court, U.S.
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In The
Supreme Court of the United States

MONTANA RIGHT TO LIFE ASSOCIATION; MONTANA RIGHT TO LIFE POLITICAL ACTION COMMITTEE; and JULIE DAFFIN, President of Montana Right to Life Association,

Petitioners,

v.

ROBERT EDDLEMAN, in his Official Capacity as County Attorney for Stillwater County, Montana, and as Representative of the Class of County Attorneys in the State of Montana, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Montana's contribution limits are closely drawn to match the important governmental interest of preserving the integrity of the political process by eliminating corruption, and the appearance of corruption, from candidate elections.

2. Whether Montana's aggregate contribution limit from political action committees impermissibly discriminates against the speech and association rights of political action committees in violation of the First and Fourteenth Amendments.

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STATEMENT OF THE CASE

Petitioners Montana Right to Life Association, Montana Right to Life Political Action Committee, and Julie Daffin, president of the Montana Right to Life Association, challenge the constitutionality of Montana's contribution limits and aggregate PAC contributions for candidates to the Montana legislature. Respondents Robert Eddleman, in his official capacity as County Attorney for Stillwater County, Montana, and a representative of the class of County Attorneys in the State of Montana, defended the constitutionality of the limits. The district court, the Honorable Jack D. Shanstrom presiding, held a four-day trial at which both sides presented evidence.

The district court found that Montana's contribution limits targeted only the "upper 10% of contributions for the particular office." (Apps. 6, 54; ER 770, 771.) Despite the contribution limits, the district court found that state legislative candidates continued to raise money well within the average cost of a state house race in Montana of $3,000 to $7,000, and the average cost of a state senate race of $6,000 to $9,000. (Apps. 6, 54.) As a result, the district court found that Petitioners had failed to demonstrate that the limits left candidates unable to run effective campaigns: "[O]utside of bald, conclusory allegations that their campaigns would have been more 'effective' had they been able to raise more money, none of the witnesses offered any specifics as to why their campaigns were not effective." (Apps. 7, 56.)

This conclusion should come as no surprise in Montana elections where legislative candidates campaign primarily door-to-door in an effort to reach voters in the average house district of 7,991 people and the average

senate district of 15,981 people. (App. 18.) Legislative candidates only occasionally advertise on radio and television (App. 18) and the only evidence presented to the district court regarding the cost of television advertising indicated that a thirty-second political spot costs $54. (ER 54.)

Besides the relatively inexpensive costs of political campaigns in Montana, the district court also found that the doubling of the allowed limit for political parties to contribute to candidates, contained within Mont. Code Ann. § 13-37-216, helped candidates run effective campaigns. (App. 18.) The ability of political parties to contribute larger amounts of money, combined with the ability of candidates to spend unlimited amounts of their own money and seek contributions from an unlimited number of persons and sources, have combined to enhance the ability of challengers to match incumbents in spending. The average gap between challengers and incumbents in legislative races has narrowed to $65 per race. (App. 21.) This narrowing of spending power may help explain why Montana maintains a robust and competitive election system, as evidenced by the fact that the 2000 election saw a record number of total candidates run in state elections in Montana and the fourth highest ever number of legislative candidates. (ER 315, 229.)

With respect to the aggregate PAC limit, the district court found the current limits of $2000 for a state senate candidate and $1250 for a state house candidate to be justified, in part, to prevent PACs from evading the individual contribution limit by contributing the statutory maximum through a multitude of individual committees. (Apps. 23, 55.)

REASONS FOR DENYING THE PETITION

The Court's decision in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), shifted the analysis to be employed by district courts in reviewing challenges to contribution limits. Courts no longer must engage in net present value calculations to determine whether a state's contribution limits comport with the $1,000 federal standard upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976). Nothing in the Court's recent decision in *McConnell v. FEC*, ___ U.S. ___, 124 S. Ct. 619 (2003), calls the validity of this analysis into question.

Not surprisingly, no court has struck down campaign contribution limits since the *Shrink* decision. *See, e.g.*, *Daggett v. Webster*, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's contribution limits of $250 for state legislative candidates); *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000) (upholding Vermont's contribution limits of $200 for state house candidates, $300 for state senate candidates, and $400 for statewide candidates, including governor). This outcome results, in large part, from the *Shrink* Court's directive that reviewing courts should consider the facts and circumstances of the locale in which the contribution limits apply. In other words, the reviewing court should consider whether "the contribution limitation is so radical in effect to render political association ineffective, drive the sound of the candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 528 U.S. at 397.

In this case, the district court evaluated Montana's contribution limits in the context of a factual record developed over four days of trial. The evidence presented to the district court showed that Montana remains one of

the least expensive states in the nation in which to run a political campaign with average cost of a state house race falling between $3,000 and $7,000, and a state senate race costing between $6,000 and $9,000. (App. 6.) Petitioners refuse to recognize these facts and continue to posit arguments that may have been significant before *Shrink*, but lack relevance when applied to the unique facts and circumstances of Montana's electoral landscape.

I. PETITIONERS' EFFORT TO MANUFACTURE CONFLICTS IGNORES MORE RECENT DECISIONS FROM FEDERAL COURTS THAT HAVE UPHELD CONTRIBUTION LIMITS WITH SIMILAR SIZE OR IMPACT IN THE WAKE OF *SHRINK*.

Petitioners seek to manufacture conflicts between the Ninth Circuit's decision and decisions of the Sixth Circuit, the Eighth Circuit, and the Tenth Circuit and other federal courts that have "struck down comparably low limits." (Pet'r Br. at 17, citing *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995)) (striking down Missouri's limits of $300 and $100); and *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) (striking down Arkansas's $300 and $100 limits); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.2d 1174, 1183 (10th Cir. 2000). The Court in *Shrink* made clear, however, that the $1,000 limit upheld in *Buckley* was not "a constitutional minimum below which legislatures could not regulate." *Shrink*, 528 U.S. at 397.

In fact, the Eighth Circuit routinely has upheld contribution limits following *Shrink*. For example, in *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838, 842-43 (8th Cir. 2000), the court, on remand, upheld Missouri's contribution limits of $525 for any state senate race and

$275 for any state house race. Similarly, in *Missouri Republican Party v. Lamb*, 270 F.3d 567 (8th Cir. 2001), the court applied *Shrink's* standards in upholding contribution limits that political parties may make to candidates. The court concluded that Missouri's limits did not drive the sound of a candidate's voice below the level of notice and political parties in Missouri "continue to have substantial avenues for expressing their support of their candidates and for maintaining a political and ideological solidarity with them" as independent expenditures remained unregulated. *Missouri Republican Party*, 270 F.3d at 571. Petitioners fail to mention these more recent cases.

Petitioners cannot point to a single decision since *Shrink* in which a court has struck down a contribution limit. In *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), the Court applied the *Shrink* standards in upholding a restriction imposed by the City of Akron that limits contributions to $300 against a freedom of association challenge. *See also North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498, 516-17 (E.D.N.C. 2000) (upholding North Carolina's $4,000 contribution limit to candidates or political parties); *Florida Right to Life, Inc. v. Mortham*, No. 98-770-Civ-Orl-19A (M.D. Fla. Mar. 20, 2000) (reproduced in Montana's SER at 89) (upholding Florida's $500 limit on contributions to candidates). Counsel for Petitioners served as counsel for the parties challenging the limitations in both of the last two citations and elected not to appeal the district court's rulings. Once again, MRLA ignores entirely these post-*Shrink* decisions.

Petitioners cite only in passing two significant decisions that have upheld contribution limits of similar amounts to those imposed under Montana law and, more importantly, imposed in states with similar populations

and costs of elections as Montana. (Pet'r Br. at 14, 18), citing *Daggett*, 205 F.3d at 460, and *Landell*, 118 F. Supp. 2d at 479. MRLA suggests that these courts upheld the contribution limits only because the evidence showed "that spending had not declined in campaigns run under the limits." (Pet'r Br. at 18.) The courts in *Daggett* and *Landell* did not rely exclusively on the narrow question of whether spending had increased under contribution limits and, even if they had done so, the record in Montana is mixed on this issue. For example, total spending in House races in 1998, under contribution limits, *exceeded* the pre-limit amount from 1992 by more than 10 percent, while the total spending in all Senate races in 1998 was only $6000 less than the total in 1992. (ER 785-786.)

II. PETITIONERS SEEK TO TRANSFORM MONTANA'S CONTRIBUTION LIMITS INTO EXPENDITURE LIMITS IN A FAILED EFFORT TO GAIN STRICTER SCRUTINY.

Petitioners seek to transform Montana's contribution limits into spending limits in an effort to manufacture a conflict with decisions from other circuits that have struck down spending limits, "including contribution limits that functioned as spending restraints." (Pet'r Br. at 21.) Both the district court and the Ninth Circuit rejected similar claims.

A. The Evidence at Trial Confirmed That Political Candidates in Montana Continue to Raise Money in Quantities Sufficient to Run Effective Campaigns.

Petitioners presented the testimony at the trial of three witnesses who ran as legislative candidates in

Montana and claimed that the new limits preclude effective campaigning and thereby operate as spending limits. The district court found such evidence unpersuasive, especially in light of the fact that two of the candidates actually raised more money *after* the enactment of Montana's contribution limits. (App. 19.) Moreover, two of these three candidates successfully were elected to their positions, and the lone losing candidate admitted that his forced absence from Montana during a pivotal campaign period prevented him from raising sufficient funds to win. (App. 19.)

Nevertheless, Petitioners urge the Court to ignore the analysis developed in *Shrink* to evaluate contribution limits and, instead, to view Montana's *contribution* limits as *expenditure* limits and thereby apply stricter scrutiny. (Pet'r Br. at 19-22.) Petitioners contend that the low dollar amount of Montana's contribution limits have been "so radical in effect as to . . . drive the sound of the recipient's voice below the level of notice." (Pet'r Br. at 20, quoting *McConnell*, 124 S. Ct. at 677 (quoting *Shrink*, 528 U.S. at 397.)) The Ninth Circuit rejected such claims when it concluded that MRLA had failed to demonstrate that Montana's contribution limits prevented candidates "from amassing the resources necessary for effective advocacy, making a donee candidate's campaign to be not merely different, but ineffective." (Apps. 20, 21.)

As noted by the Ninth Circuit, the fact that Montana's contribution limits are low should come as no surprise "in light of the fact that Montana is one of the least expensive states in the nation in which to mount a political campaign." (App. 18.) For example, the only evidence in the record regarding the cost of television advertising indicated that a 30-second political spot in Montana costs $54. (ER 54.) Despite the low cost of television advertising in

Montana, legislative campaigns remain largely informal affairs. Legislative candidates campaign primarily door-to-door in an effort to reach voters in the average House district of 7,991 people and the average Senate district of 15,981 people. (App. 18.)

B. The Evidence at Trial Confirms that Electoral Competition in Montana Remains Robust.

Petitioners selectively cite to the record to support their claim that Montana's contribution limits shield incumbent officeholders from effective competition. (Pet'r Br. at 22-23.) Petitioners assert that electoral competition dropped in Montana after the onset of the contribution limits as evidenced by the alleged lack of competition in legislative races. (Pet'r Br. at 23.) Petitioners fail to mention, however, that the 2000 election in Montana generated a record number of total candidates in state elections and the fourth highest ever number of legislative candidates. (ER 315, 229.) The 2000 election marked the third election cycle to be conducted under the contribution limits.

Many factors likely contribute to the renewed robustness of electoral competition in Montana. The ability of political parties to contribute larger amounts of money played a role. Mont. Code Ann. § 13-37-216. Similarly, the ability of candidates to spend unlimited amounts of their own money and seek contributions from an unlimited number of persons and sources likely enhanced the ability of challengers to match incumbents in spending. By the 2000 election cycle, the average gap between challengers and incumbents in legislative races had narrowed to $65 per race. (App. 21.) This evidence presented to the district

court belies Petitioners' claims that contribution limits have stifled democracy in Montana.

III. THE NINTH CIRCUIT PROPERLY RECOGNIZED THAT MONTANA'S AGGREGATE PAC LIMIT REPRESENTS A CONTRIBUTION LIMIT, RATHER THAN AN EXPENDITURE LIMIT.

Petitioners again argue that the Ninth Circuit applied an overly deferential standard of scrutiny to Montana's aggregate PAC limit. (MRLA Pet. at 27.) Specifically, Petitioners argue that the aggregate PAC limit impermissibly discriminates against PACs, that it is not closely drawn to serve Montana's anti-corruption purpose, and that it operates as an expenditure limit on PACs. (Pet'r Br. at 28-29.) All of these claims lack merit.

A. Montana's Aggregate PAC Limits Serve a Substantial Government Interest in Combating Corruption that Justifies Any Differential Treatment of PACs.

The Ninth Circuit found any differential treatment of PACs to be justified where the differential treatment is necessary to serve a substantial government interest. (App. 23.) The record in this case, including a letter from a state senator to his colleagues in which he urged them to vote for a bill in order to keep insurance industry PAC money in the Republican camp, and testimony by various members of the Montana legislature to the effect that PACs funnel money into state legislative campaigns to "get results," demonstrated that differential treatment of PACs was justified. (App. 23, citing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990) (prevention of

corruption justification sufficient to justify differential treatment of corporations).)

B. Montana's Narrowly-Drawn PAC Limits Permit Numerous Avenues for PACs to Associate with Candidates of Their Choice.

Petitioners allege that Montana's aggregate PAC limit is not narrowly drawn in that it unconstitutionally forces a candidate to reject a group's gesture of support. (Pet'r Br. at 28.) This claim fails to recognize that a candidate who has "PAC'd out" may return some money from one PAC to make room for other PAC money. In this way, Montana law does not infringe upon a PAC's freedom of association by allowing a candidate to accept contributions from an unlimited number of PACs. Yet, Petitioners dismiss a candidate's ability to return contributions in order to accept symbolic contributions from PACs as worse than "pointless" in that a candidate must expend "some quantity of time and money to refund it or another contribution." (Pet'r Br. at 28.)

The Ninth Circuit recognized, however, that PACs also retain the freedom, under Montana law, to associate with candidates in ways other than direct contributions. (App. 27.) PACs may volunteer services to a candidate's campaign, may endorse a candidate, or may independently buy advertising in support of a candidate. (App. 27.) More importantly, Montana's aggregate PAC limits do not restrict independent political expenditures and do not limit speech based on its content, and, therefore, the aggregate PAC limits do not warrant the type of strict scrutiny urged by MRLA. As a result, the Ninth Circuit correctly concluded that Montana's aggregate PAC limits are not "so radical in effect as to render political association ineffective, drive the

sound of the candidate's voice beyond the level of notice, and render contributions pointless." (App. 27, quoting *Shrink*, 528 U.S. at 387-88.)

C. PACs Retain Numerous Avenues to Engage in Political Expenditures to Support the Candidates of Their Choice.

Finally, Petitioners' claim that the aggregate PAC limits operate as an expenditure limit on PACs ignores the reality of Montana law. The aggregate PAC limit does not prevent PACs from contributing unlimited amounts to political parties. (App. 5.) The aggregate PAC limit does not prevent PACs from spending unlimited amounts of money on independent political advertisements, including advertisements in support of a political candidate, as long as these independent expenditures are not coordinated with the candidate. (Apps. 5, 26.) And the aggregate PAC limits do not prevent PACs from otherwise engaging in unlimited amounts of political speech. (Apps. 5, 26.) The record at trial demonstrated that MRLA had failed to take advantage of any of these other avenues of political speech freely available to them under Montana law. (ER 124, 125, 126.)

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

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